In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 512

GENERAL TIME CORPORATION, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 399 F. 2d 396. The opinion of the district court is reported at 286 F. Supp. 50.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1968. The petition for a writ of certiorari was filed on September 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a company, some of whose shares have been acquired by a registered investment company in

325-725—68

conjunction with the latter's affiliate, is entitled to relief against the violation of Section 17(d) of the Investment Company Act that such acquisition involved.

2. Whether a registered investment company and its statutory affiliate, who purchased the securities of such a company in violation of Section 17(d) of the Investment Company Act and rules thereunder, should be prohibited from voting the securities to accomplish the aim of the illegal purchase.

STATUTE INVOLVED

The relevant statutory provisions, Section 17(d) of the Investment Company Act of 1940, 15 U.S.C. 80a–17(d) and Rule 17d–1 promulgated thereunder, 17 CFR 270.17d–1, are set out in Appendix C of the petition.

STATEMENT

On April 19, 1968, the Securities and Exchange Commission held in a Memorandum Opinion and Order [1] that Talley Industries, Inc. ("Talley"), an affiliated person [2] of American Investors Fund, Inc. ("the Fund") (an investment company registered under the Investment Company Act), had engaged with the Fund in a plan to acquire substantial stock of General Time Corporation ("General Time") for the purpose of facilitating Talley's goal of bringing about a merger with General Time. The Commission held that Section 17(d) of the Investment Com-

[1] *In re Talley Industries, Inc.*, Investment Company Act Release No. 5358.

[2] As that term is defined in Section 2(a)(3) of the Investment Company Act of 1940, 15 U.S.C. 80a–2(a)(3).

pany Act and Rule 17d–1 thereunder [3] were applicable to the stock purchases, and, therefore, that advance approval by the Commission should have been sought before any securities were purchased. Because the Commission found no compelling showing justifying the delay in the filing of the application, it refused retroactive approval of the joint transaction.

At General Time's annual shareholders' meeting on April 22, 1968, Talley and the Fund voted the shares of General Time stock, acquired in violation of the Act, to effectuate Talley's attempted takeover. On May 1, 1968, the Commission brought suit in the district court to enjoin future violations by Talley and the Fund and to ~~acquire~~ require them to withdraw their votes.[4] The district court dismissed the Commission's complaint on the ground that, contrary to the Com-

[3] Section 17(d) (Pet. App. 41a) makes it unlawful for a company in which a registered investment company owns five percent or more of the voting shares to act as principal in effecting any transaction in which the investment company is a joint or joint and several participant in contravention of such rules as the Commission may prescribe for the purpose of limiting or preventing participation by the investment company on a basis different from or less advantageous than that of the other participant. Rule 17d–1 generally requires that no such joint enterprise be participated in or effected until an application has been filed with and approved by the Commission.

[4] Meanwhile, the shareholders' meeting had been adjourned until May 3, 1968, at which time the official election inspectors were to report the results of the vote. The court of appeals noted in its July 31, 1968, decision that preliminary reports indicated a victory for Talley's slate (399 F. 2d at 401). The reconvening of the shareholders' meeting has been stayed or adjourned since the time the Commission instituted its action.

mission's administrative determination, Section 17(d) and Rule 17d–1 had not been violated.[5]

On July 31, 1968, the court of appeals reversed, holding that the purchases of General Time stock by Talley and the Fund constituted a joint transaction by an investment company and an affiliated person in violation of Section 17(d) of the Act and Rule 17d–1 thereunder. The court of appeals directed the district court "to proceed promptly to formulate an injunction consistent with this opinion" 399 F. 2d at 406. The mandate was transmitted to the district court on September 13, 1968. Forms of proposed judgment were submitted by the parties, including the Commission, and on October 4, 1968, the district court entered a permanent injunction, patterned to a great extent after the proposed judgment submitted by Talley.[6]

---

[5] In addition to the present action commenced by the Commission, General Time, petitioner herein, brought two actions of its own in the district court seeking to prevent Talley from taking steps toward a successful takeover of General Time. The court of appeals affirmed the order of the district court which dismissed General Time's complaint under Section 17(d) of the Investment Company Act and Rule 10b–5 of the Securities Exchange Act of 1934, 17 CFR 240.10b–5. The court, in the same opinion, affirmed the district court's denial, in General Time's other action, of its motion for a preliminary injunction seeking to restrain the use of proxies allegedly obtained in violation of Rule 14a–9(a) under the Securities Exchange Act of 1934, 17 CFR 240.14a–9(a), *General Time Corporation* v. *Talley Industries, Inc., et al.*, C.A. 2, Nos. 32299, 32300, October 23, 1968. General Time has filed a petition for a writ of certiorari to review the court's denial of relief in its proxy action. See *General Time Corp.* v. *Talley Industries, Inc., et al.*, No. 716, this Term, filed November 6, 1968.

[6] The district court's Final Judgment of Permanent Injunction is set forth in the Appendix to this brief.

Briefly, the district court enjoined future violations of Section 17(d) of the Investment Company Act and Rule 17d–1 thereunder, by prohibiting Talley and the Fund (so long as Talley is an affiliated person of the Fund) from "hereafter" entering into any transaction in which Talley and the Fund are joint or joint and several participants without first having obtained the Commission's approval under Section 17(d) and Rule 17d–1.

The judgment provided (*infra*, pp. 11–12) that none of the following acts, *inter alia*, would be deemed a prohibited "transaction" (if there is no communication or consultation between Talley and the Fund): voting the shares of General Time now owned by either of them on any matter; nomination by or on behalf of Talley of directors for election to the Board of Directors of General Time; solicitation by Talley of proxies for the election of such nominees or in respect of any merger or consolidation or sale of assets involving General Time; and a merger or consolidation of General Time and Talley. The judgment specified, however, that nothing therein would affect any applications that might be required under Section 17(b) of the Act, 15 U.S.C. 80a–17(b).[7]

The judgment also provided that, so long as the Fund continues to own any General Time shares, Talley may not dispose of *its* General Time shares except on certain conditions designed to provide protection for the Fund; and that should Talley decide to dis-

[7] In the Commission's view, a proposed merger of General Time and Talley would require approval by it under that subsection.

pose of its General Time shares in a manner other than particularized in the judgment, prior approval by the Commission and thereafter by the district court would be required.

The court further ordered that the adjourned shareholders' meeting be reconvened on October 10, 1968, and that the votes cast at that earlier meeting (including the votes cast by Talley and the Fund) be counted and reported.

General Time appealed from that permanent injunction. On November 1, 1968, the court of appeals heard oral argument on the appeal. One of the issues there involved is the appropriateness of the relief granted by the district court. General Time has urged that the district court should have granted the relief requested by the Commission and that that court was required to defer to the Commission in order that the integrity of the regulatory scheme might be protected.[8]

ARGUMENT

General Time's petition seeks to have this Court pass upon questions that were not finally disposed

[8] In the proposed final judgment submitted by the Commission to the district court we had requested, among other things, that the court enjoin Talley and the Fund from taking further steps with regard to the General Time stock, including voting of the shares, unless prior approval is obtained from the Commission.

The Commission did not appeal from the judgment of the district court, even though it did not grant much of the relief the agency had sought. The Commission did, however, in response to suggestions by members of the court of appeals that the Commission's views would be welcome, file a brief with that court.

of by the judgment below but that are presented in the appeal that is presently *sub judice* before the court of appeals following the remand.[9] Accordingly, without focusing on whether the questions framed in the petition would, if presented in the proper posture, warrant review by this Court, review at this juncture should not be granted. The instant petition is in one sense premature and in another possibly academic, since it seeks review of a judgment remanding for further proceedings that have now been held and that are in the process of appellate review. Consideration by this Court of the intermediate judgment which is the subject of the present petition would not be appropriate.

Although General Time characterizes the refusal of the court of appeals in its July 31, 1968, decision to direct the district court to enter an order against voting the stock as "Denying the Relief Sought by the

[9] The court of appeals, in an intervening opinion in a related action, noted that it had, in its July 31, 1968, opinion in the instant case, already ruled "that the [district] court could not properly require Industries [Talley] and Fund to withdraw any votes cast at the stockholders' meeting or enjoin any further voting of such shares * * *" *General Time Corporation* v. *American Investors Fund, Inc.*, C.A. 2, No. 32300, October 23, 1968 (slip opinion at 116). Actually, in the opinion underlying the judgment petitioner seeks to have reviewed at this juncture, the court merely observed, after stating that it was not undertaking to particularize a decree, that "*as at present advised*, we fail to perceive how the interest of Fund's stockholders would be advanced by such provisions as requiring [Talley] and Fund to withdraw votes cast at the April 22 stockholders' meeting of General Time and enjoining further voting by them" (Pet. App. 17a) (emphasis added).

SEC" (Pet. 6), the court of appeals itself indicated that it did "not undertake to particularize the form of a decree" (399 F. 2d at 405). Indeed, General Time asserts in its pending appeal that the district court too narrowly construed the court of appeals' mandate (Brief of General Time, p. 10). Thus, while the questions presented by the petition may lurk in the opinion of the court below, we believe that they have not been squarely passed upon.

In any event, whether the court of appeals' decision of July 31, 1968, is viewed as an outright rejection of the relief requested by the Commission, as the court intimated in the intervening opinion in No. 32300 (*supra*, note 9), or is viewed as indicating the necessity for further consideration of the appropriateness of the relief to be granted, that same court is expected to clarify the issues when it disposes of the pending appeal. Indeed, should the court of appeals accept the arguments of General Time and conclude that the district court's injunction should have granted the relief requested by the Commission, the questions raised by General Time in the instant petition for a writ of certiorari would become academic. In any event, under a sound certiorari policy any consideration of the issues actually or potentially presented by this litigation should take place in the context of a concrete, final decree, and not merely on the basis of an interlocutory opinion by the court of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PHILIP A. LOOMIS, JR.,
General Counsel,
Securities and Exchange Commission.

NOVEMBER 1968.

APPENDIX

United States District Court for the Southern District of New York

68 Civ. 1762

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF

v.

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., CHESTNUTT CORPORATION, AND GENERAL TIME CORPORATION, DEFENDANT

Filed October 4, 1968

FINAL JUDGMENT OF PERMANENT INJUNCTION

This matter having come on for trial before this Court without a jury, * * * and this Court having issued a final judgment and order dismissing the complaint as to all defendants; and the Court of Appeals for the Second Circuit having on July 31, 1968 issued its opinion reversing the said judgment and directing this Court to proceed promptly to formulate an injunction consistent with its opinion, and the mandate of the said Court of Appeals having been transmitted to this Court on September 13, 1968; and this Court having been advised by the Commission, by Industries, and by Fund and Chestnutt Corporation that they did not wish to present any further evidence on the subject of the relief to be granted by injunction and this Court having been advised by General Time that it wished to present further evidence on that subject

but this Court declining to receive such evidence from General Time as a nominal party defendant; and proposed forms of final judgment (with supporting memoranda) having been submitted by the Commission, by Industries, and by Fund and Chestnutt Corporation, respectively, and General Time having submitted a statement (with supporting memorandum) requesting entry of final judgment in the form proposed by the Commission; and after hearing counsel for the parties on this date,

Now, it is hereby

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

I

A. So long as, or whenever, defendant Industries is an "affiliated person" of defendant Fund as that term is defined in Section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. § 80a–2(a)(3); the "Act"), defendants Industries and Fund are permanently enjoined from hereafter effecting any transaction in which Industries acts as principal and in which the Fund is a joint or a joint and several participant with Industries without first having obtained from the Commission approval under Section 17(d) of the Act and under Rule 17d–1 promulgated thereunder (17 CFR 270.17d–1).

B. None of the following acts is a "transaction" enjoined by paragraph A provided there is no consultation between Industries and Fund concerning the act and no communication between them concerning the act (other than that required by law or by this judgment):

1. The voting on any matter by Industries or Fund at any meeting of shareholders of General Time of any shares of common stock of General

Time ("General Time shares") now owned by either of them.

2. The nomination by or on behalf of Industries of directors for election to the Board of Directors of General Times and the solicitation by Industries, alone or in conjunction with others (not including, however, Fund) of proxies for the election of such nominees or the solicitation of proxies in respect of any merger, consolidation or sale of assets involving General Time.

3. The disposition by Fund at any time, or from time to time, of General Time shares now owned by it.

4. A merger or consolidation of General Time and Industries or any subsidiary of Industries or a sale of the assets of General Time to Industries or any subsidiary of Industries, or a sale of the assets of Industries to General Time or any subsidiary of General Time.

Nothing contained in this judgment affects whatever applications may be required under Section 17(b) of the Act.

II

So long as Industries is an "affiliated person" of Fund as that term is defined in Section 2(a)(3) of the Act, defendant Industries is permanently enjoined from entering into or inducing Fund, through its investment adviser or otherwise, to enter into any transaction in which Fund is a joint or a joint and several participant with Industries.

III

So long as Fund continues to own any of the shares of capital stock of General Time now owned by it,

defendant Industries is permanently enjoined from selling any shares of capital stock of General Time now owned by it on the New York Stock Exchange (the "Exchange") except in accordance with the following procedure: if Industries proposes to make sales of General Time stock on the Exchange, it shall notify Fund by telephone or by telegraph of the number of shares proposed to be sold; within three full business days after the giving of such notice, Fund shall notify Industries that it (Fund) does or does not propose to sell on the Exchange shares of General Time stock owned by it (Fund) within the following ten business days; if Fund notifies Industries that it (Fund) does not propose to sell any shares of General Time stock on the Exchange in that period, then Industries may sell on the Exchange its General Time shares to that number of shares stated in the notice given; if Fund notifies Industries that it (Fund) proposes to sell General Time shares on the Exchange within the following ten business days, then Industries may not sell its General Time shares on the Exchange for a period of ten business days after receipt of the notice from Fund, unless in the meantime, Fund has completed its proposed sales, as to which it shall notify Industries, or Fund shall have notified Industries that Fund had abandoned its proposal to sell General Time shares within the period. Industries shall not in any event sell on the Exchange more than 10,000 General Time shares in any five business day period nor more than 25,000 such shares in any calendar month.

IV

So long as Fund continues to own any of the shares of capital stock of General Time now owned by it, defendant Industries is permanently enjoined from hereafter disposing of General Time shares now owned

by it (Industries) except by sales on the Exchange as provided in III above and except as follows:

A. in exchange for securities of another corporation (or cash, or a combination of cash and securities) in connection with the merger, consolidation, sale of assets or liquidation of General Time, so long as such disposition by Industries is on terms and conditions available to Fund and to all other shareholders of General Time pro rata;

B. pursuant to a tender offer from any person (not an affiliated person, or an affiliated person of an affiliated person, of Industries or of the Fund), *provided* that such offer is made to Fund and to all other shareholders of General Time, and *provided further* that if any such offer is limited to a specified number of General Time shares and if the Fund shall advise Industries in writing, not later than 10 days prior to the expiration date of such offer (or not later than the expiration of one half the period of such offer if the term thereof is less than 10 days), that it desires to accept such tender offer, Industries shall take appropriate steps to give the Fund the opportunity to dispose of all of the General Time shares which Fund desires to dispose of in response to such offer, before Industries shall dispose of any of its General Time shares in response to such offer;

C. with respect to a proposed disposition by Industries of General Times shares in any other manner than one described above, Industries shall give written notice to Fund of such proposed disposition. Such notice shall include: (a) a description of each proposed transaction with the name

of each proposed purchaser from Industries, the number of shares proposed to be disposed of, the consideration to be received by Industries, the method of payment and the proposed closing date; and (b) a statement that arrangements have been made for Fund to be offered an opportunity to dispose of such number of General Time shares owned by it as is equal to the percentage of Industries' then holdings of such stock proposed to be so disposed of by Industries, such arrangements to provide for such disposition by Fund on exactly the same terms and conditions as the disposition by Industries. At the expiration of five business days after any such notice is given to Fund, Industries may proceed to dispose of the number of General Time shares set forth in the notice by it to Fund, and in the manner set forth in such notice, provided that, if within such five day period Fund elects to accept the opportunity to dispose of General Time shares on the terms specified in such notice and has so advised Industries, its (Fund's) General Time shares have been disposed of as provided in such notice; and

D. in any other manner approved by the Commission and thereafter approved by this Court.

V

Defendant Fund is enjoined promptly to notify Industries and the Commission (a) when, as and if Fund ceases to be a holder of five percent (5%) or more of Industries' outstanding voting securities and (b) when, as and if Fund ceases to be a holder of all General Time shares now owned by it.

VI

Defendant General Time is enjoined to reconvene the Annual Meeting of Shareholders of General Time, recessed from time to time since April 22, 1968, at 2 P.M. on Thursday, October 10, 1968, and to include the votes heretofore cast by Industries and Fund at the Annual Meeting of Shareholders of General Time held on April 22, 1968 in the count of votes cast at the meeting, and to require the inspectors of the election of directors of General Time to report on the results of the voting at the aforementioned Annual Meeting and to complete the business at said Annual Meeting in accordance with the By-laws of General Time and in accordance with its normal practice.

VII

This action is dismissed as to defendant Chestnutt Corporation.

VIII

Jurisdiction is retained by this Court for the purpose of enabling any party to apply at any time to this Court for such further order and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any provisions hereof, for the enforcement of compliance herewith or for the punishment of violations hereof.

Dated: New York, New York
October 4, 1968

INZER B. WYATT,
United States District Judge.

Judgment entered:

_____ _____,
Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1968